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In The

Supreme Court of the United States

October Term, 1988

MASSACHUSETTS MUNICIPAL WHOLESALE ELECTRIC COMPANY,

Petitioner,

v.

VERMONT DEPARTMENT OF PUBLIC SERVICE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Vermont

---

BRIEF OF VERMONT ELECTRIC COOPERATIVE, INC. IN OPPOSITION TO MOTION OF CONTINENTAL BANK N.A. TO FILE BRIEF AS AMICUS CURIAE AND IN RESPONSE TO BRIEF OF CONTINENTAL BANK N.A. AS AMICUS CURIAE

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Vermont Electric Cooperative, Inc. ("VEC") (Plaintiff below and Respondent herein)[1] opposes the request of Continental Bank N.A., as Bond Fund Trustee, ("Continental Bank") for leave to file its brief as *amicus curiae* in support of petitioner.

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[1]VEC is the principal member of the Vermont Electric Generation and Transmission Cooperative, Inc.

The Court should deny Continental Bank's motion because it has failed to satisfy the standards set forth in Rule 36 of the Supreme Court Rules. Continental Bank fails to set forth facts or questions of law that have not been presented, or reasons for believing that they will not adequately be presented by the parties as required by Rule 36. Nor, of course, has Continental Bank pointed to the relevancy of any such questions to the disposition of the case.

Continental Bank asserts in its motion that its repayment source may be reduced 20 percent and that other Massachusetts utilities assert that they are excused from making payments

under their power sales agreements. The Petition, however, adequately discusses both of these facts. Petition at 16. The only arguably new assertion Continental Bank presents is the specter of a potential threat to bond market stability for which it presents no evidence bearing on the nearly ten months since the Vermont Supreme Court's decision. Beyond the fact that the bond market effect argument was never specifically raised below, it is difficult to determine how the bank's discussion of bond market stability is distinguishable from the Petition's discussion of economic impact.

In addition to the foregoing and as more fully set forth in the Brief of VEC in Response to Continental Bank's Brief as Amicus Curiae in Support of

Petitioner, Continental Bank's *Amicus* Brief is so riddled with factual and legal inaccuracies that it is not worthy of consideration by this Court. Continental Bank's motion for leave to file a brief as *amicus curiae* in support of petitioner should be denied.

Respectfully submitted,

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BRIEF OF VERMONT ELECTRIC COOPERATIVE, INC. IN RESPONSE TO CONTINENTAL BANK N.A.'S BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

ARGUMENT

I. CONTINENTAL BANK'S AMICUS BRIEF IS SO RIDDLED WITH FACTUAL AND LEGAL INACCURACIES THAT IT IS NOT WORTHY OF CONSIDERATION BY THIS COURT

Respondent, Vermont Electric Cooperative, Inc. ("VEC") (Plaintiff below and Respondent herein) believes it is obligated to direct the Court's attention to the numerous inaccuracies regarding fact and law riddled throughout the *amicus* brief of Continental Bank N.A., Bond Fund Trustee ("Continental Bank"). Continental Bank's brief reflects a final desperate act to convince the Court to review a case unworthy of further consideration. Unfortunately, that act of desperation strains the bounds of candor and good faith.

A. Continental Bank's Amicus Brief Misrepresents the Record Below

Continental Bank's representation of the proceedings below gives the impression that the Massachusetts Municipal Wholesale Electric Company ("MMWEC") repeatedly and regularly raised its constitutional defenses at every stage of the state court proceedings: "Petitioner also contended that, if the contracts were invalidated under state law, that result would violate the federal Constitution . . . [t]he [Vermont Supreme] [C]ourt simply ignored the constitutional provisions upon which petitioner relied. . . " *Amicus* Brief at 3-4. Continental Bank however, fails to explain that MMWEC never raised its constitutional defenses, after it mentioned those

defenses in the initial pleadings, until its brief before the Vermont Supreme Court on its motion to reargue. As explained in VEC's Brief in Opposition at 18, that was too late. More egregious is Continental Bank's unsubstantiated claim that the trial court proceedings "deferred the affirmative federal defenses to a later stage. . ." *Amicus* at 5. There is no basis for this claim in the record. *See e.g.*, Petition at 82a-84a. (Trial Court's full discussion of "Constitutional Violations" without mention of MMWEC's constitutional defenses). Nonetheless, Continental Bank attempts to support this careless contention by quoting language from Petitioner's brief on appeal completely out of context. Continental Bank's

quotation of a passage from MMWEC's brief and its unexplained and unidentified omission of a significant footnote contained in that passage constitute a blatant misrepresentation to this Court of the record below. *See* Brief of VEC in Opposition at 3a-4a (relevant text in full). That misrepresentation was hardly an oversight. A reading of the full relevant text makes it clear that not only did MMWEC fail to preserve its constitutional defenses, but it went even further to affirmatively waive them. Brief in Opposition at 15.

B. Continental Bank's Brief Amicus Mischaracterizes "Violation of Due Process":

The Vermont Supreme Court did not deny MMWEC of its right to procedural due process. MMWEC had an opportunity

to have its constitutional defenses heard, but instead waived those defenses. See VEC Brief in Opposition at 18. It is MMWEC's ample opportunity to raise its defenses, that distinguishes this case from *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), upon which Continental Bank relies. In *Logan*, the state court held the failure of a state agency to convene a factfinding conference within the statutory timeframe precluded the Plaintiff's claim, although the Plaintiff did all it could to obtain a timely conference. *Id.* at 426-428. This Court held that the Plaintiff was deprived of a meaningful opportunity to present his claim. *Id.* at 437. Unlike the Plaintiff in *Logan*, MMWEC did have a reasonable opportunity to present its

defenses in its brief before the Vermont Supreme Court. By failing to brief those defenses, however, MMWEC waived them. *See* V.R.A.P. Rule 40; VEC Brief in Opposition at 18. "The State may erect reasonable procedural requirements for triggering the right to an adjudication. . . .And the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Logan*, 455 U.S. at 437.

Continental Bank curiously cites to the Supremacy Clause in support of its due process argument. Discussion of the Supremacy Clause is unnecessary. It cannot be disputed that the Fourteenth Ammendment's due process standards apply to state action. Further, this case does not

involve a situation where a state court expressly refused to enforce a federal statute on the unfounded assertion that a state need not enforce foreign laws, *Testa v. Katt*, 330 U.S. 386, 388 (1947), or a properly presented question regarding the constitutionality of federal statutes, *FERC v. Mississippi*, 456 U.S. 742, 752 (1982).

Indeed, a perusal of Continental Bank's cited Supremacy Clause cases reveals that it did little more than read marginally helpful *dicta*, while ignoring holdings, supporting principles and whether the cases are genuinely supportive. For example, in *Duckworth v. Serrano*, 454 U.S. 1, 3-5 (1981), this Court held that, because a state habeas corpus petitioner failed

to raise the issue before the state courts, she waived her right to argue that she had been deprived of her Sixth Amendment rights. This parallels VEC's argument that MMWEC similarly waived its constitutional defenses. Thus, *Duckworth* demonstrates that this court should deny the writ.

Further, at least once Continental Bank effectively misrepresents the Court's holdings by improperly editing the Court's language. For example, in *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731, 731-32 (1967), this Court reversed a state court decision because the Plaintiff's admiralty negligence claim was not, preempted by a federal statute as the state court ruled. This Court noted in *dictum*, "In this

situation it is the duty of the Louisiana courts to adjudicate this case." *Id.* at 735. Of course, by "this case," the Court referred to the Plaintiff's negligence claim, not to federal statutory or constitutional claims. Continental Bank, however, misquoted this language, improperly altering its meaning: "it is the duty of the [state] courts to adjudicate [federal claims]." *Amicus* at 5. This Court should not condone such inaccuracy in an *amicus* brief.

Finally, Continental Bank's citation to *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 282 (1932) is inapposite. *Lawrence* does not consider whether a state court litigant, which failed to assert its federal claims until its motion to reargue, properly

asserted those claims below. Instead, *Lawrence* explains that the state court's jurisdiction "was rightly invoked." *Id.*

C. The Constitution Does Not Prohibit Retroactive Application of the Vermont Supreme Court's Decision

Continental Bank argues that MMWEC presents a substantial constitutional question because retroactive application of the Vermont Supreme Court's decision may adversely effect the bond market. However, Continental Bank tries to raise this stale and selfserving assertion with no evidence to support it. Continental cannot hang a constitutional claim on the hook of unsubstantiated hindsight. Continental Bank's citations in support of this notion are misplaced. In both *City of Phoenix v. Kolodziejski*, 399

U.S. 204 (1970) and *Cipriano v. Houma*, 395 U.S. 701 (1969), this Court held that restricting the voting franchise on municipal general obligation and municipal revenue bonds, respectively, to property taxpayers violated the Constitution. *Id.* at 706 (*citing Carrington v. Rash*, 380 U.S. 89 (1965)), *Kolodziejski*, 399 U.S. at 213. This Court limited the retroactivity of its decision because its decision would have national impact. *See Cipriano*, 395 U.S. at 706, *Kolodziejski*, 399 U.S. at 214-215. A denial of MMWEC's petition, however, will hardly have national impact. Instead, denial of the writ will merely leave one state's decision intact. Denial of the writ will not foreclose the possibility that this Court will

later review similar, but better preserved issues from litigation originating in another state.[1]

D. Vacating the Judgment Below Would Cause Respondents to Suffer Substantial Undue Prejudice

Continental Bank claims that a summary vacation of the judgment below and a remand to the state courts would not prejudice any legitimate interest of respondents. *Amicus* at 9. "Rather, they simply would have to litigate the federal defenses that petitioner raised as early as its answer to the complaint." *Id.* Continental Bank

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[1]This case does not present a situation where retroactive application of a rule of procedure would deprive a litigant of his day in court, as in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 108 (1971). Instead, MMWEC deprived itself of its day in court by waiving its constitutional defenses below.

neglects to mention that (a) MMWEC failed to so much as mention those defenses after its initial pleadings, until its motion to reargue before the Vermont Supreme Court, and (b) MMWEC went even further to waive those defenses. Respondents were entitled to rely upon MMWEC's waiver; vacating the judgment below would penalize that reliance by forcing Respondents again to incur the expense and uncertainty of litigation.

CONCLUSION

Continental Bank's repeated factual and legal inaccuracies demonstrate a lack of candor before the Court. At a minimum, the Court should disregard Continental Bank's brief. In any event, Continental Bank presents no relevant facts or law not already

discussed in the Petition and VEC's opposition. Thus, for the reasons discussed above, and the reasons discussed in VEC's Brief in Opposition, VEC respectfully requests that the Court deny the Writ.

Respectfully submitted,

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